

## 8. DHS' Detention and Removal Operation is Failing

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Despite a number of border security initiatives aimed at increasing arrests and detentions, due to poor planning, the Detention and Removal Operation has not been adequately funded. The failure to support this critical aspect of an immigration enforcement system has resulted in the voluntary return to Mexico of hundreds of thousands of apprehended illegal immigrants and the release within the United States of tens of thousands on bond, 80 to 90% of whom fail to appear for court and deportation proceedings.



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## **DRO Resources Have Not Kept Pace with Increased Apprehensions**

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The Detention and Removal Operation (DRO), a component of the DHS' Immigration and Customs Enforcement (ICE), has a critical mission in securing our Nation's borders. It is solely responsible for detaining and monitoring the cases of illegal immigrants in removal proceedings. Its general mission is to provide custody management to support the removal of illegal immigrants through the immigration courts and to ultimately enforce their departure from the United States.

To fulfill this mission the DRO has a multitude of critical responsibilities from the time an illegal immigrant is apprehended to eventual deportation. It includes transporting apprehended illegal immigrants from the interdiction agencies, primarily Border Patrol, to DRO facilities where they are fed, housed, and given medical care while in detention. Once there, the DRO is responsible for processing the illegal immigrant through immigration courts including any appeals. If ordered released, DRO handles that process. Likewise, if the illegal immigrant is ordered deported or otherwise returned to his or her country of nationality, DRO is responsible for securing the appropriate legal travel documents from the foreign governments and for transporting the person back to that country, at U.S. government expense.

Historically, DHS and its predecessors have mainly focused resources toward the apprehension side of the border equation with little, if any, increase in resources to other key border components, especially the detention and removal process. For example, in 1998 the DRO area of responsibility in Brownsville, Texas, had 300 Border Patrol agents to make apprehensions, today there are 1,700 agents. Despite this large build up, DRO has added no new bed space or manpower at the Port Isabel Service Facility.<sup>222</sup> Likewise, the recent Arizona Border Control (ABC) initiative significantly increased Border Patrol assets to that specific area of the Arizona border with minimal addition to the DRO budget or staff.

Approximately one million illegal immigrants were apprehended last year, and it is predicted that, more than 1.2 million will be apprehended in fiscal year 2004.<sup>223</sup> The DRO, however, is only capable of detaining approximately 200,000 illegal immigrants per year. In fiscal year 2004, DRO facilities were funded for 19,444 beds for illegal immigrants; the current daily average is 22,500.<sup>224</sup> To fund these additional 3,056 beds at a \$90 per bed daily average, the DRO facilities are delaying purchases of vehicles, cutting training, and cutting costs in all other means possible.

In the first seven months of fiscal year 2004, the U.S. Border Patrol apprehended 660,538 illegal immigrants on the Southern Border; a 31% increase for the same period in fiscal year 2003.<sup>225</sup> It has been reported that this significant increase in apprehensions has

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<sup>222</sup> ICE DRO briefing to staff at Port Isabel Service Center, Port Isabel, Texas. One additional dormitory has been planned for fiscal year 2005.

<sup>223</sup> CBP Congressional Affairs provided Border Patrol apprehension statistics to the staff.

<sup>224</sup> ICE Congressional Affairs provided DRO statistics to staff as of July 2004.

<sup>225</sup> *Ibid.*

overwhelmed DRO facilities and their resources for housing, medical attention, feeding, court proceedings and removal.

The fiscal year 2005, DRO budget does not present much relief as only an additional 117 beds are proposed. Even worse, in fiscal year 2005, the total number of beds could be significantly reduced pending a breached bond reduction issue currently under negotiations with DRO. On August 26, 2004, Victor Cerda, Director of the DRO briefed staff of the Select Committee on Homeland Security on the possible 1,400 bed reduction, \$46 million loss of revenue in fiscal year 2005, pending negotiations and legal proceedings with bond surety companies for monies owed.

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## **Releases Caused by DRO Shortfalls Compromise Security**

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Because DRO resources have not kept pace with increased apprehensions of illegal immigrants, DRO has become the weakest link in an already tenuous chain of border enforcement. Lacking sufficient detention space or funds to pay for detention in other facilities, apprehending agencies have been forced to return hundreds of thousands of illegal immigrants, who claim to be Mexican nationals, to Mexico under a “voluntary return” provision.

There is little consequence to those who “voluntarily return.” They usually spend just a few hours in either a holding cell or a larger DRO facility until their paperwork is finished and transportation can be arranged to return them to the nearest port-of-entry where they are released to cross back to Mexico. Border Patrol agents advised that sometimes they apprehend and release the same person a number of times in the same week or even the same day.

Border officials report that illegal immigrants have learned that as long as there is no violence related to their illegal entry or capture, they will usually not be prosecuted. Depending upon the resources of the local U.S. Attorney and DRO facilities, an illegal immigrant may be apprehended as many as 15 times before being prosecuted. Some Border Patrol agents confided that they had been told there was no limit on the number of apprehensions. As a consequence, there is no disincentive to the illegal immigrant to keep trying to cross the border since the process has evolved into a game of “catch and release.”

Insufficient resources and detention space have similar, but more dangerous, security consequences in cases dealing with OTMs caught crossing the Southern Border. Unlike with Mexican apprehensions, which are released back to Mexico, OTMs will not be accepted by Mexican authorities. As a result, tens of thousands of OTMs are directly released into U.S. communities on a personal recognizance bond, many times with no local forwarding address and only with an order to appear before an immigration court at some future date. Under Secretary Asa Hutchinson recently acknowledged that over 90% of those released never appear for their appointed court appearance or final deportation.<sup>226</sup>

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<sup>226</sup> Media Roundtable with Under Secretary Asa Hutchinson on Immigration Policy Changes, August 10, 2004. Available at <http://www.dhs.gov/dhspublic/>.

For example, at the Port Isabel, Texas, DRO facility, which serves Brownsville Border Patrol, the daily log book reflected 101 calls for OTMs detention. Of these, 72 OTMs were refused that day; an OTM acceptance rate of approximately 30%. Management advised that on average approximately 40 OTMs a day were rejected for lack of space at this facility alone. In Brownsville, the Border Patrol reported that out of 14,000 OTMs apprehended through May of fiscal year 2004, 9,500 were released due to lack of DRO capacity.

The release of such a high percentage of OTMs into the interior of the United States is a significant security gap. DRO and/or apprehending authorities do not always know who they are actually releasing because many illegal immigrants do not carry identification or use aliases or spelling variations of their names. United States databases including those of the DRO do not interface with foreign country databases for criminal checks for crimes committed by the illegal immigrant in their home country.<sup>227</sup> Staff learned that a number of Federal judges along the border have repeatedly expressed their concerns with this situation to ICE officials.<sup>228</sup>

Border Patrol agents have uncovered evidence that organized smuggling rings have capitalized on this security gap and are using it to recruit and smuggle potential Brazilian immigrants into the United States. Coyotes have advertised this loophole in Brazil and are telling the Brazilians to bring proof of Brazilian nationality so U.S. officials will treat them as OTMs, not Mexicans. The coyotes are also instructing the Brazilians that once they cross the Rio Grande, they should immediately seek out and surrender to Border Patrol agents so that they can hasten the release process.<sup>229</sup>

Even if the illegal immigrant is from a country of interest, typically defined as those countries recognized by the State Department as sponsoring terrorism (for example Syria and Iran) this alone will not guarantee detention. By statute, DRO is only required to detain illegal immigrants who are aggravated felons, known terrorists, associates of terrorists, or persons suspected of certain other criminal violations.<sup>230</sup>

DRO facilities will often only detain immigrants from a COI if the apprehending agency advises DRO that they have made a determination that the individual meets one of the statutory requirements for mandatory detention referenced in the prior paragraph. DRO officials at some facilities stated that they or the apprehending agency will contact their local Joint Terrorism Task Force (JTTF) to offer them an opportunity to interview the COI detainee. In short, there is no statutory requirement to detain illegal immigrants from COIs and some are being released into the United States.

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<sup>227</sup> Foreign country databases are not interoperable with U.S. law enforcement databases. The DRO databases do interface with Interpol for international lookouts.

<sup>228</sup> ICE management briefing in Corpus Christi, Texas, reported this was a repeated concern of federal judges in the Corpus Christi, Texas, judicial district.

<sup>229</sup> Staff interview.

<sup>230</sup> United States Code. Vol. 8, sec. 1101 (a) (43).

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## **DRO is Ineffective at Removing Nondetained Aliens**

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Of additional concern is a February 2003, Department of Justice Office of the Inspector General report summarizing failures to remove nondetained persons from the United States including those from states that sponsor terrorism.<sup>231</sup> The report found that only 13% of nondetained aliens with final removal orders were actually removed from the country. Even more troubling is the report is finding that only 6% of nondetained aliens with final removal orders from countries identified by the U.S. Department of State as state sponsors of terrorism had been removed from the United States.

A recent arrest illustrates this possible terrorist concern. On July 20, 2004, Kamran Akhtar, aka Kamran Shaikh, a Pakistani foreign national, was stopped and questioned when a police officer witnessed him videotaping downtown banks in Charlotte, North Carolina. Akhtar gave evasive and false statements concerning his actions and citizenship and was subsequently arrested. A review of Akhtar's videotape revealed footage of the Texas State Capitol building, the governor's mansion, and downtown Austin businesses as well as structures in Houston, Dallas, Atlanta and New Orleans. Akhtar, a nondetained alien, who claimed he entered the United States through Mexico, had been under a final immigration removal order since 1998.<sup>232</sup>

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## **Foreign Governments Unreasonably Delay or Limit Repatriation**

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DRO bed space shortages have been exacerbated by the refusal of some foreign countries to take their nationals back. Some foreign governments refuse to accept their nationals; others will only take a limited number of them. Vietnam, China, India, Jamaica, Iraq, Iran, Poland, Nigeria, former Soviet Republics, Laos, Eritrea, and Nigeria, for example, have refused or otherwise delayed issuing travel documents for the return of their nationals. El Salvador will only accept ten of their citizens a month to be returned from the DRO. Consequently, 141 El Salvadorians were found occupying needed bed space at the time of our visit to the Port Isabel facility alone.<sup>233</sup>

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## **Innovative Programs Must be Implemented**

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Also contributing to the shortage of DRO bed spaces are the number of federal, state, and local prisoners who have completed their sentences but are being housed in DRO facilities awaiting the conclusion of their deportation proceedings. DRO officials recommended to staff that the deportation proceedings should begin while the convict is serving his or her prison term in a non-DRO facility so that the illegal immigrant would immediately be deported upon completion of their sentence and not occupy limited DRO bed space.

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<sup>231</sup> U.S. Department of Justice Office of the Inspector General, I-2003-004, "The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders," February 2003, p ii-iii.

<sup>232</sup> Affidavit from ICE Special Agent on arrest of Kamran Shaikh, August 5, 2004.

<sup>233</sup> Staff field visit at Port Isabel, Texas, DRO detention facility on June 8, 2004.

DRO has plans in place to accomplish this objective, but this effort needs more funding and staffing. To accommodate this and other programs, there is a critical need for additional DOJ immigration judges who have to adjudicate the immigration and deportation petitions.

DRO officials have also initiated a program of using “home-monitoring” as an alternative to incarceration for some of the illegal immigrants determined to be less likely to flee and not appear for their deportation hearing. Immigrants in this program wear an electronic monitoring device around their ankle, which is capable of reporting their location. DRO officials reported that it has been relatively successful, is more cost effective than detention, and could be expanded if additional funding were provided.

In an attempt to break the “catch and release” cycle, DHS has instituted a plan to repatriate illegal immigrants from Mexico to the interior of that country instead of directly on the border. The theory is that this will make it more difficult for them to again try to cross the border since they will have to pay for their transportation back to the border from the interior location.

This has been a controversial proposal that was initially opposed by the Mexican government when tried as part of the ABC initiative. Subsequently, a compromise was arranged where it is totally voluntary. Only those illegal Mexican immigrants who want to be transported back to the interior of their country will be sent there. To date, only 7,584 illegal Mexican immigrants of the 316,293 apprehended in the ABC initiative have volunteered to be repatriated to the interior.<sup>234</sup> The rest are still being released on the border to repeat the cycle of “catch and release.”

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<sup>234</sup> CBP Congressional Affairs provided ABC initiative statistics as of August 25, 2004.

## **DHS' Detention and Removal Operation is Failing**

### **Conclusions and Recommendations**

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The “catch and release” cycle must be broken. For the United States to have a coherent border security strategy, there must be some consequence for trying to illegally enter our country. Due to increased apprehensions and security concerns, detention facilities need to be built or expanded to meet the need for additional bed space. Penalties need to be enhanced and resources need to be provided to the Department of Justice to prosecute and imprison those illegal immigrants who routinely flaunt our immigration laws by repeatedly crossing the borders illegally. Specifically we recommend:

1. A comprehensive assessment needs to be completed to determine the amount of additional detention space and resources required to detain all persons presenting a possible threat to homeland security. In conducting this assessment, it is important to assess the needs of all of the agencies involved in the detention and removal operation, including immigration judges, prosecutors, detention guards, deportation and removal specialists and support staff.
2. In the interim, DRO should immediately be funded to adequately support the current average daily bed occupancy rate of 22,500 from the 19,444 funded levels. This will allow the DRO to continue to fund needed infrastructure improvements such as fleet repair, equipment needs, and training, routinely cut by bed space overages. This will also provide for additional apprehensions reasonably expected to result from ongoing enforcement actions such as the ABC initiative.
3. DHS needs to increase support for innovative programs that can reduce the current shortage of DRO bed space. This includes, but is not limited to, current programs to alternative means of detention such as electronic monitoring, telephonic voice recognition programs for those on bond, and conducting deportation proceedings prior to prisoners' release from federal, state, and local prisons.
4. The Administration needs to encourage other countries to expedite their acceptance of their nationals caught illegally entering the United States. This should be a priority for negotiations on foreign assistance and trade agreements with these countries. If countries will not take back their nationals caught illegally entering our country, then the State Department should decline to issue visas for their nationals seeking to enter our country.
5. DHS should consider placing Detention and Removal Operations within Customs and Border Protection. This allows the primary apprehension agency, Border Patrol, and the detention agency, Detention and Removal Operations, to better coordinate apprehension resources and initiatives with detention resources.

